IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 711

THE BURKE-PARSONS-BOWLBY CORPORATION, ET AL.,
Appellants,

against

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal From the United States District Court for the Southern District of West Virginia

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MOTION TO AFFIRM
of
The Baltimore and Ohio Railroad Company

The Baltimore and Ohio Railroad Company (B&O), intervening defendant before the three-judge District Court and applicant for the assailed abandonment certificate of the Interstate Commerce Commission (Commission), moves that the judgment of the District Court be affirmed on the ground that the questions raised in Appellants' jurisdictional statement are without merit and do not warrant further consideration.

STATEMENT AND ARGUMENT

B&O concurs in, and adopts as though incorporated herein, the statement and argument of the joint motion to affirm being filed by the United States and the Commission. Additionally, B&O points out that the authorized abandonment of the admittedly deficit 32-mile branch line, which handled an average of only 45 revenue carload shipments per month and where rehabilitation expenditures of upwards of $800,000 are necessary to continue the branch at safe minimum maintenance standards, was carefully and properly considered and determined by the three members of the Finance Review Board of the Commission. See *Colorado v. United States*, 271 U.S. 153, and *Purcell v. United States*, 315 U.S. 381. Upon petitions for reconsideration and rehearing, and replies thereto, the abandonment authorization was unanimously upheld by the three members of Division 3 of the Commission. On appeal, followed by extensive briefs and oral argument, the District Court unanimously sustained the action of the Commission, and its opinion analyzed and rejected Appellants' contentions. The District Court tested the Commission's action in the light of applicable standards, found compliance therewith, and concluded that the abandonment authorization "is based upon adequate findings which are supported by substantial evidence."

This appeal merely challenges the adequacy of a particular finding of the Commission. The appeal presents no question as to the scope of the Commission's jurisdiction, no novel question, and no question of statutory interpretation. Accordingly, there is no occasion for plenary consideration by this Court. Appellants are simply disappointed with the Commission's decision authorizing B&O's abandonment and with the District Court sustaining that decision.

While Appellants argue that "The report of the Review Board does not even contain the quasi-jurisdictional finding that the future public convenience and necessity permit abandonment," such contention overlooks the last finding of the Commission's report stating ". . . we find that the present and future public convenience and necessity permit abandonment . . ." Moreover, the certificate itself also recites that ". . . the present and future public convenience and necessity permit abandonment . . ."

Appellants' fundamental contention is that the Commission "made no positive finding as to future traffic." It is submitted that the following portion of the Commission's report speaks for itself in this regard and constitutes an adequate finding as to future traffic prospects:

> ". . . In view of the fact that operations over the branch have not been profitable for the last 3 years — and there can be no dispute on this point — the applicant should not be compelled to assume the heavy and burdensome financial obligations with respect to the repair and future maintenance of the branch unless potential traffic could be assured to the full extent visualized by the protestants. The traffic and revenues contemplated, however, cannot be predicted with any degree of certainty.
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> "The prospects that some users — old and new — anticipate increased use of the branch does not warrant finding that the area will generate sufficient traffic in the future to reduce to a substantial degree the losses that would be incurred in operating the branch at safe minimum maintenance standards. Thus, it follows without any doubt whatsoever that costs of rehabilitation which it would be forced to make if we denied the application could not be recouped by applicant. The speculative nature of the evidence with respect to future traffic detracts from its probatory effect. All of the shippers on the branch are either currently using motor transportation for some portion of their movements, or are competing with other shippers employ-

> ing motor carrier service. The record is convincing that there is adequate motor carrier service available to meet the needs of the area shippers. Sound judgment dictates that the present pattern of transportation by motor vehicle will not be so altered as to make rehabilitation of the line financially feasible." (328 I.C.C. 114-115)

If Appellants are contending that the Commission should have made a finding as to the precise amount of future traffic, such contention is clearly without merit. See *Transit Commission v. United States,* 284 U.S. 360, wherein at page 370 this Court stated, "the Commission need not determine with mathematical exactness the extent of the burden imposed upon interstate commerce by the operation of a branch line." See also *Brotherhood of Maintenance of Way Employees v. United States,* 221 F. Supp. 19, affirmed *per curiam* 375 U.S. 216, wherein the District Court stated at page 25 of its decision, "The Commission was not required to engage in speculation and guesswork to come up with a precise percentage prediction."

CONCLUSION

For the foregoing reasons, we respectfully submit that the appeal presents no substantial issue warranting plenary consideration, and that the judgment of the District Court should be affirmed.

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Dated at Washington, D. C.,
this 9th day of November, 1967.